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In the Supreme Court of the United States

OCTOBER TERM, 1987

(3)

No. 87-255

MAGD E. ZOHDI, QUALITY CONTRACTING AND SERVICES INC., ET AL., PETITIONERS
v.
THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF SUN BELT FEDERAL BANK, F.S.B., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF FOR FSLIC

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Pursuant to Rule 22.5, petitioners MAGD E. ZOHDI, et al., file this reply to respondent FSLIC's brief, which was filed in this Court on October 2, 1987.

First. We disagree with the Solicitor General's contention (FSLIC BR. 21) that Questions 1 and 2 of our petition for certiorari are "both overbroad and difficult to fathom." Certainly the fundamental question whether FSLIC has adjudicatory power under 12 U.S.C. § 1729 (d) is stated with sufficient clarity. Our reference to Article III in Question 1 (Pet. i) obviously flags "*The* Northern Pipeline *Problem*" lurking in the background. See *Morrison-Knudsen Co., Inc. v. CHG Intern., Inc.*, 811 F.2d 1209, 1221 (9th Cir. 1987). On the other hand, the Solicitor General's casting of the question presented (FSLIC BR. (I)) cuts this case adrift from its statutory moorings and ignores the separation of powers problem that is part of this case.

Second. We agree with the Solicitor General's contention (FSLIC BR. 21) that the question of the appropriate standard of judicial review of FSLIC and Bank Board administrative determinations is premature at this stage. Hence Question 3 (Pet. i) can be put off to another day.

Third. Petitioners strongly oppose the Solicitor General's effort to wipe the certiorari writ clean of the question of the effect of the Bank Board's express written approval of the settlement agreement worked out in federal court and reduced to judgment in this case. See Pet. 5-6 and Appendix "B," Pet. A-22. There is more to Question 4 of our Petition than the "factual question" (FSLIC BR. 22) the Solicitor General would make of it. "As is true of many problems in the law, the answer is to be found not in legal learning but in the realities of the record." *Indianapolis v. Chase National Bank*, 314 U.S. 63, 69 (1941) (Frankfurter, J.). The Bank Board's approval of the settlement agreement below, which triggered the surrender of real property and petitioners' liens valued at 2.8 million dollars, is a reality of the record which this Court should not ignore.

To permit FSLIC to dishonor the Bank Board's prior express approval of the settlement agreement and reject the federal court's judgment is at best to play a cruel joke on petitioners. See *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government"), quoted in *Heckler v. Community Health Services*, 467 U.S. 51, 61 n.13 (1984). At worst, allowing FSLIC to treat petitioners as unsecured creditors of Sun Belt risks a retroactive taking of private property without just compensation. *Cf. Louisville Bank v. Radford*, 295 U.S. 555 (1935) (retroactive application of Frazier-Lemke Bankruptcy Act to pre-existing liens violates

Fifth Amendment); *Armstrong v. United States*, 364 U.S. 40 (1960) (Government action destroying value of petitioners' liens held a "taking" for which compensation due under Fifth Amendment).

At any rate, we submit that the question of estoppel raised in Question 4 of our Petition is a legal issue worthy of this Court's review. Indeed, the very case the Solicitor General cites (FSLIC BR. 22 n.13) as disposing of our estoppel claim, *viz.*, *Heckler v. Community Health Services*, 467 U.S. 51 (1984), rejects any flat rule that estoppel may not in any circumstances run against the Government. "We have left the issue open in the past, and do so again today." *Id.*, at 60.

CONCLUSION

The petition for a writ of certiorari should be granted limited to Questions 1, 2, and 4 of the petition.

Respectfully submitted,

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